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DIVISION OF BANKING
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December 16, 1997

Ms. Cynthia L. Johnson, Director
Cash Management Policy and Planning Division
Financial Management Service
U.S. Department of the Treasury
401 14th Street, S.W. - Room 420
Washington, D.C. 20227
FAX: (202) 874-6965

Re: **Federal Payments By Electronic Funds Transfer**
Proposed Regulations, 31 C.F.R. § 208
RIN 1510-AA56

Dear Ms. Johnson:

I am pleased to submit the following comment on behalf of the New Jersey Department of Banking and Insurance, on the above-referenced rulemaking proposed by the United States Department of the Treasury. See 62 Fed. Reg. 48714 (September 16, 1997). The proposed rules would implement the Debt Collection Improvement Act of 1996, Pub. L. No. 104-34, § 31001(x), which amended 31 U.S.C.A. § 3332 to, among other things, require the payment by electronic funds transfer ("EFT") of federal payments as of January 2, 1999. We have no objection to the substance of these proposed rules.

Rather, the Department wishes to bring to your attention the following matter which we believe to be of particular relevance to Treasury's concern that the regulation "ensure that all individuals required to receive payments electronically will have access" to an appropriate bank account. See 62 Fed. Reg. at 48,721. Contrary to clear expressions of Congressional intent, the Comptroller of the Currency ("OCC") has let stand a 1992 Interpretive Letter that federal law preempts application of the New Jersey Consumer Checking Account Act of 1991 ("NJCCA"), N.J.S.A. 17:16N-1 et seq., to national banks doing business in New Jersey. See OCC Interpretive Letter No. 572 ("OCC-IL-572") (January 15, 1992), reprinted in [1992 Transfer Binder] Fed.

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Banking L. Rep. (CCH) ¶ 83,342. We believe the OCC's preemption ruling is unreasonable, and have formally sought its reconsideration and reversal. See 61 Fed. Reg. 4515 (Feb. 6, 1996) (Notice of request for reconsideration). To date, however, the OCC has taken no action on this longstanding request.* We welcome this opportunity to repeat our request for reconsideration, as the proposed rulemaking on EFTs highlights the substantial benefits that would flow to both consumers and government from application of the NJCCA uniformly to all depository institutions in this State, including national banks, at least pending the adoption of consonant federal regulations.

The NJCCA is designed to provide New Jersey's young, low-income, and elderly consumers with access to basic banking services, including electronically accessible deposit accounts. N.J.S.A. 17:16N-1; 17:16N-3f(1). Thus, the NJCCA and its implementing rules, N.J.A.C. 3:1-19.1 et seq., provide, on the State level, precisely the regulatory framework for EFTs of federal payments which Treasury intends, in the near future, to construct in accordance with 31 U.S.C.A. § 3332(i)(2). See 62 Fed. Reg. at 48721 ("Treasury believes the design of... Federally-provided accounts is critical to the successful implementation of the Act"). The New Jersey regulatory scheme provides a model for federal regulators to consider in designing such a federal account. The OCC's preemption ruling, therefore, is clearly counter-productive.

Congress agrees. When it passed the Bank Enterprise Act of 1991 ("BEA"), 12 U.S.C.A. §§ 1834, 1834a, and 1834b, Congress intended to make basic financial services available at low cost, and required the Federal Reserve Board (the "Fed") and the Federal Deposit Insurance Corporation ("FDIC") to establish minimum requirements for "life-line accounts." 12 U.S.C.A. § 1834. To date, neither the Fed nor the FDIC has promulgated such requirements.** Thus, the federal "life-line account" statute has never been implemented, and remains, in effect, a dead letter.

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* The Department has asked the OCC repeatedly for, at the least, information on the status of its request for reconsideration, most recently through correspondence from its counsel, Deputy Attorney General Thomas M. Hunt, dated June 2, 1997. We have received no reply.

** Nor, to our knowledge, has there been an appropriation to fund the BEA, which is another prerequisite to the effectiveness of the life-line account provision. 12 U.S.C.A. § 1834(c). See 61 Fed. Reg. 4516, n. 2.

When, in 1991, the New Jersey Legislature enacted the NJCCA, it intended its consumer checking accounts to be a means of achieving the same goal of providing disadvantaged consumers with access to basic banking services at all depository institutions (in New Jersey), including national banks. N.J.S.A. 17:16N-1. Yet, despite the complete absence of the federal regulations necessary to give any effective life to 12 U.S.C.A. § 1834, the OCC opined that the federal law preempted the NJCCA. OCC-IL-572, at 71,478. It based this finding on the fact that the NJCCA, though otherwise consistent with the BEA, required depositories to offer life-line accounts, whereas the BEA made national bank participation voluntary. Ibid. The result was a perceived direct conflict of laws, resolved through preemption of the State law. Ibid.

The OCC's technical approach to the interrelationship of the BEA and the NJCCA was expressly rejected by federal legislators involved in drafting the BEA. In a House Conference Committee Report accompanying the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, they stated that the OCC had applied traditional preemption principles in an "inappropriately aggressive" manner with respect to the NJCCA, which they deemed "a situation where the federal interest did not warrant that result." A&P H.R. Conference. Rpt. 103-651, *2074-2075 (Aug. 2, 1994). They further stated that:

> In the case of [OCC-IL-572], it is the sense of the Conferees that the fact the Congress has acknowledged the benefits of more widespread use of lifeline accounts through the enactment of the [BEA] did not indicate that Congress intended to override State basic banking laws, or occupy the area of basic banking services to such an extent as to displace State laws, or that the existence of State basic banking laws frustrated the purpose of Congress. [Ibid.]

With the passage of the Debt Collection Improvement Act of 1996 and the coming of federal payments by EFT in 1999, the widespread use of life-line accounts has become not merely a benefit, but a virtual necessity. The logic of the Conference Report is even more convincing today.

Furthermore, the application of the NJCCA to national banks will clearly advance the objectives discussed in Treasury's proposal:

> One of Treasury's domestic policy objectives is to encourage individuals who do not have an

> account at a financial institution to move into the financial services mainstream. Since the Act was passed, Treasury has been working with services and the financial industry on educational efforts designed to encourage individuals to open an account at a financial institution so that they can receive their Federal payments by Direct Deposit... Treasury hopes that many recipients without accounts will open accounts as a result of these public and private sector educational and marketing efforts. [62 Fed. Reg. at 48721.]

In New Jersey, recipients without an account need look no further than the New Jersey consumer checking account which must be offered pursuant to law by every depository institution doing business in the State. N.J.S.A. 17:16N-3a.

Treasury, recognizes that probably not all recipients will obtain accounts by January 2, 1999, and that 31 U.S.C.A. § 3332(i)(2) requires Treasury to "ensure" that such persons have an account. Therefore, it discusses three approaches to meeting its obligation to ensure such have an account. 62 Fed. Reg. at 48721 (discussing the terms of proposed 31 C.F.R. § 208.5). First, it rejects requiring all financial institutions to provide a basic account. Ibid. Secondly, it rejects establishing standards for a basic account program, reminiscent of the BEA life-line account, in which financial institutions could voluntarily participate. Ibid. It selects a third approach: engagement of one or more qualified financial institutions to act as Treasury's financial agent to provide account services to recipients not otherwise possessing one. Ibid. The selection of such a financial agent will be pursuant to regulations to be proposed at a later date. Ibid. Thus, Treasury's solution to the provision of banking services to those currently without an appropriate account still lies in the future.

Therefore, we believe that, at least pending the implementation of such a financial agent program or other approach to the problem, the Secretary of the Treasury should direct the OCC to reverse its ruling that the application of the NJCCA to national banks is preempted, in order to maximize the availability of basic banking services to New Jersey recipients of Federal payments consistently with the Debt Collection Improvement Act of 1996.*

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* We do not here address the question whether the adoption of the financial agent program contemplated by Treasury would result in preemption of the NJCCA as to national banks.

We thank you for your consideration of this comment.

Sincerely yours,

John M. Traier

John M. Traier, Deputy Commissioner
Division of Banking